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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 560

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS AND MANUFACTURERS ASSOCIATION, INC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR EASTERN DISTRICT OF NORTH CAROLINA

STATEMENT AS TO JURISDICTION

F. C. HILLYER,
J. C. B. EHRINGHAUS,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NORTH CAROLINA,
RALEIGH DIVISION

Civil Action No. 189

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MFRS. ASSOC., INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

Defendants.

JURISDICTIONAL STATEMENT BY DEFENDANT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The plaintiffs, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers & Manufacturers Association, Inc., North Carolina Division of the Travelers Protective Association of America and B. F. Russell, respectfully presents the following statement disclosing the

basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the order and decree in the above entitled cause sought to be reviewed:

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, 36 Stat. 1150, October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191; Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 804; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

B. The Statute of a State, or the Statute or Treaty of the United States, the Validity of Which Is Involved.

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved. See statement of nature of case below.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented

The order and decree sought to be reviewed was entered on July 22, 1944. The petition for appeal was presented on August 21, 1944, together with an assignment of errors.

D. Nature of Case and of Rulings Below

This is an appeal from an order and decree of the District Court of the United States for the Eastern District of North Carolina which was entered on July 22, 1944, and which denied Petitioners' (appellants) request for an interlocutory injunction to restrain and enjoin the order of the Interstate Commerce Commission requiring the passenger rail carriers operating in North Carolina to adjust their intrastate passenger coach fares to the level of interstate fares notwithstanding an order of the State Regulatory Commission declining to so do in the absence of a further showing of revenue necessity and of the true picture with respect to receipts and operating expenses in intrastate passenger rail operation in North Carolina under present conditions. The order appealed from further dismissed the petitioners action requesting a permanent injunction.

The District Court so acting was constituted under the provisions of Section 47, Title 28 U. S. C., and consisted of the Honorable John J. Parker, Circuit Judge, the Honorable I. M. Meekins and the Honorable Johnson J. Hayes, District Judges.

The application for an interlocutory injunction was based upon a petition which was filed by the State of North Carolina and the North Carolina Utilities Commission and this application and petition was later adopted by the Charlotte Shippers & Manufacturers Association, Inc., and North

Carolina Division of the Travelers Protective Association of America who intervened herein.

The petition purported to be filed in accordance with the provisions of Section 41 (28) and Sections 43 to 48 inclusive of Title 28 U. S. C. Upon petition for leave to intervene by Fred M. Vinson, Director of the Office of Economic Stabilization by Chester Bowles, Price Administrator of the Office of Price Administration, which was allowed by the District Court.

The order of the Interstate Commerce Commission against which relief was sought was entered on May 8, 1944, and corrected May 24, 1944, and its effective date fixed as August 1, 1944. It required the carriers to increase their intrastate passenger coach fares to the level of the interstate fares by said date of August 1, 1944.

The petition contained allegations that the said orders of the Interstate Commerce Commission were made without adequate findings of fact and upon findings which, in each instance challenged, had no substantial evidence in support; that the Commission had declined to hear certain evidence which would show with definiteness and certainty the operating costs of said carriers in conducting said intrastate transportation or to postpone action upon the request of the carriers to allow said increase until said facts had been shown to the State Regulatory Body; that the carriers had declined or failed to show such facts to the North Carolina Utilities Commission though requested to so do; that there was no revenue necessity for said order increasing intrastate fares but on the contrary the carriers present earnings from passenger coach travel upon interstate and intrastate was already excessively high; that there was no burden imposed by existing intrastate fares upon interstate travel; that no travelers and no localities were either burdened by or complained of said existing intrastate fares;

that interstate travelers enjoyed certain valuable privileges of travel on deluxe trains which privileges were substantial and in fact in all cases upon some lines and in almost all cases on the others denied intrastate travelers; that petitioners had been denied a full hearing before the Commission; that the Commission had denied the State's request for an investigation into the reasonableness of interstate fares under present conditions; that the Commission, in reaching its conclusions; had erroneously applied certain principles of law and had erroneously used certain legal principles which are not applicable to this controversy; that the enforcement of said increased rates will work irreparable injury and damage upon intrastate passenger travelers aggregating over $500,000 per year.

The order of the Commission here challenged and the decision of the District Court approving this order goes, as we respectfully submit, further toward depriving the State Regulatory Bodies of their power to control intrastate rates than any prior decision of this or any other Court of which we have knowledge. By its approval and paramounting of the principle of unformity, viz., identity of interstate and intrastate fares, it holds in effect that the fares fixed by the Interstate Commerce Commission shall always control and the intrastate fares fixed by the local control at a lower level shall always yield in order to obtain uniformity. It leaves no room for intrastate regulation where it differs from an interstate fare. It substantially denies to State Regulatory Agencies any lawful power to prescribe a fare which is lower than existing interstate fares even though the carriers themselves, as in this case, have previously and voluntarily established and had the Interstate Commerce Commission approve a lower fare and have, as in this instance, voluntarily increased the interstate fares from and above the intrastate level. In effect it permits the carriers

who have sought and obtained approval of a 1.5 fare to force intrastate fares above the level fixed by the State Regulatory agency and to an interstate level which said carriers have now voluntarily achieved.

E. Cases Sustaining the Supreme Court Jurisdiction of the Appeal

Florida v. *U. S.*, 282 U. S. 194, 211-212, 292 U. S. 1.
Railroad Commission of Wisconsin v. *Chicago B. & Q. R. Co.*, 257 U. S. 563.
State of New York v. *U. S.*, 257 U. S. 591.
U. S. v. *Louisiana*, 290 U. S. 70.
City of Yonkers v. *U. S.*, 64 S. Ct. 327.

F. Decree and Opinion of the District Court

Appended to this statement is a copy of the opinion of the District Court and a copy of the decree of said Court sought to be reviewed.

We therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated, August 19, 1944.

F. C. Hillyer,
J. C. B. Ehringhaus,
Attorneys for Petitioners.

APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

No. 28963[1]

ALABAMA INTRASTATE FARES

Submitted February 18, 1944. Decided March 25, 1944

Intrastate passenger fares in Alabama, Kentucky, North Carolina, and Tennessee, where lower than the corresponding interstate fares, found to cause undue advantage, preference, and prejudices as between persons in intrastate commerce on the one hand and interstate commerce on the other, and unjust discrimination against interstate commerce.

William C. Burger, Charles Clark, Joseph P. Cook, James B. Gray, Frank W. Gwathmey, Y. D. Lott, Jr., Edward D. Mohr, W. A. Northcutt, L. L. Oliver, and *Charles P. Reynolds* for respondents.

Hugh White, W. C. Harrison, Gordon Persons, J. G. Bruce, and *Norwood Johnson* for Alabama Public Service Commission; *Hubert Meredith* and *M. B. Holifield* for Commonwealth of Kentucky; *Frank L. McCarthy, Jack E. Fisher, Mrs. John W. Langley,* and *J. E. Marks* for Railroad Commission of Kentucky; *Stanley Winborne, Fred C. Hunter, R. G. Johnson, F. C. Hillyer,* and *H. M. Nicholson* for North Carolina Utilities Commission; and *Leon Jourolman, Jr.,* and *J. O. Hendley* for Railroad and Public Utilities Commission of Tennessee.

M. D. Miller, George J. Burke, David F. Cravers, Warren Price, Jr., Richard H. Field, and *Bernard M. Fitzgerald* for Price Administrator and Economic Stabilization Director.

James E. Burkett, W. R. McDonald, Crawford L. Pilcher, A. J. Young, Frank L. McCarthy, J. E. Marks, W. H.

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[1] This report also embraces No. 29000, Kentucky Intrastate Fares; No. 29036, North Carolina Intrastate Coach Fares; and 29037, Tennessee Intrastate Fares.

Amerine, F. C. Hillyer, and *Henry M. Johnson* for other interveners.

Report of the Commission

By the COMMISSION:

These proceedings were heard and briefed separately, but were orally argued together. They embody similar issues, upon which the evidence adduced in the respective proceedings is substantially similar, and will be disposed of in one report.

They are investigations instituted upon petitions by the rail carriers operating, respectively, in Alabama, Kentucky, North Carolina, and Tennessee, to determine whether the refusal of the regulatory authorities of those States to authorize or permit the application to the transportation of passengers traveling intrastate therein of fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and to determine what fares and charges, if any, or what maximum or minimum or maximum and minimum fares and charges, should be prescribed to remove such advantage, preference, prejudice, or discrimination, if any, as might be found to exist. All common carriers by railroad operating within Alabama, Kentucky, North Carolina, and Tennessee subject to our jurisdiction were made respondents, and those States were notified of these proceedings.

The regulatory commissions of the respective States intervened each in the proceeding wherein lies its chief interest; the Price Administrator in behalf of himself and the Director of Economic Stabilization intervened in all of the proceedings; and several other persons or associations of persons or corporations appeared in one or more of the proceedings to protest against any increase in fare.

History of rail fares.—In southern passenger association territory, hereinafter referred to as southern territory,

which, generally speaking, is that territory east of the Mississippi River and south of the Ohio and Potomac Rivers, the basis of one-way fares from April 1, 1908, to June 9, 1918, was generally 2.5 cents per mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, the fare was increased to 3 cents per mile in all classes of equipment. This fare remained in effect until August 25, 1920, but during the period June 10 to November 30, 1918, an additional charge of 16⅔ percent of the one-way fare was assessed for travel in sleeping and parlor cars. From August 26, 1920, to November 30, 1933, the fare generally was 3.6 cents per mile in all classes of equipment, plus a surcharge on transportation in sleeping and parlor cars on and after December 1, 1918, of 50 percent of the charge made for space occupied in such cars.

During 1932 and 1933, certain of the carriers operating in southern territory experimented with fares lower than 3.6 cents in attempts to attract additional passenger business in competition with transportation by private automobiles and in busses. For example, from April 1 to November 30, 1933, experimental one-way fares of 3 cents per mile in sleeping or parlor cars, without a surcharge, and 2 cents per mile in coaches, were maintained by the Atlanta and West Point Rail Road Company, The Western Railway of Alabama, Mobile and Ohio Rail Road Company (now part of the Gulf, Mobile and Ohio Railroad Company), Louisville and Nashville Railroad Company, and The Nashville, Chattanooga & St. Louis Railway. During the same period the Southern Railway system lines were experimenting with coach fares of 1.5 cents per mile on certain portions of their lines.

On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5-cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and the

St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees).

In *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches or pullman cars. The pullman surcharge was found unreasonable and its cancelation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful.

On November 15, 1937, the carriers which had been maintaining the experimental coach fare of 1.5 cents increased that fare to 2 cents per mile, but restored the 1.5-cent fare on January 15, 1939. Again, certain of the southern lines, including the Illinois Central, Mobile & Ohio, St. Louis-San Francisco, and Norfolk and Western Railway Company, retained the 2-cent fare basis.

By order of January 21, 1942, in Ex Parte No. 148, we found that a Nation-wide increase of 10 percent in fares proposed by the railroads was necessary to enable the petitioners to continue to render adequate and efficient transportation service during the national emergency, and that the proposed increased fares would be reasonable and otherwise lawful. See *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 565, 566, where the foregoing findings were renewed and affirmed.

The reestablished coach fares of 1.5 cents remained in effect until February 10, 1942, on which date the 10 percent increase in fares for transportation in both coaches and pullman cars became effective. On that date fares of 1.5 cents became 1.65 cents; fares of 2 cents became 2.2 cents; and fares of 3 cents became 3.3 cents. The round-trip fares were modified to reflect the increase in the one-way fares. On various subsequent dates these increased fares also became effective on intrastate traffic in all of the States.

On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their

lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. Having found in *Passenger Fares and Surcharges, supra,* that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines of petitioners, we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority, one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic. Effective on the same date the railroads generally throughout southern territory, published a uniform basis of interstate round-trip fares to displace the round-trip fares theretofore in effect, namely, in coaches on the basis of 180 percent of the one-way fare of 2.2 cents, or 1.98 cents a mile, with a return limit of 3 months; and in sleeping and parlor cars on the basis of 166⅔ percent of the one-way fare of 3.3 cents in such cars, or 2.75 cents a mile, with a return limit of 3 months. The increased fares proposed for application in southern territory were protested and suspension of their operations was requested by the Price Administrator, but we declined to suspend. The fares so increased are now in effect on interstate traffic.

Thereafter, with the approval of the rate regulatory authorities of those States, the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars were increased to the respective levels of the corresponding interstate fares in Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina, and the round-trip fares in sleeping and parlor cars were increased to the level of the interstate fares in such cars in North Carolina and Kentucky. The rate regulatory authorities of Alabama, North Carolina, Tennessee, and Kentucky have declined to authorize the increases sought by the railroads in one-way and round-trip coach fares in those States, and the rate regulatory authorities of Alabama and Tennessee have also refused to authorize the increases in the round-

trip fares in sleeping and parlor cars. It is those fares in the four States last named which are here under investigation.

As a basis for a finding of violation of section 13 (4) of the act, the interstate fares must be shown to be reasonable. *Georgia Public Service Comm.* v. *United States,* 283 U. S. 765; *United States* v. *Louisiana,* 290 U. S. 70. Therefore, before proceeding to a consideration of the evidence submitted in the respective proceedings bearing directly upon the issues under section 13 (4), we shall first consider the evidence bearing upon the reasonableness of the interstate fares.

Level of the Interstate Fares

Comparing the interstate one-way coach fare of 2.2 cents with basic fares in effect at various times during the period from April 1, 1908, to November 30, 1933, it will be seen that the fares in effect from April 1, 1908, to June 9, 1918, were 13.6 percent higher than the present fares; those in effect June 10, 1918, to August 25, 1920, were 36.4 percent higher; and those in effect August 26, 1920, to November 30, 1933, were 63.6 pereent higher. The 1.5-cent fare in effect from December 1, 1933, to November 14, 1937, and from January 15, 1939, to February 9, 1942, was a subnormal fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles.

When in *Passenger Fares and Surcharges, supra,* in 1936, we reduced the basic interstate coach fares throughout the nation from 3.6 to 2 cents, we gave consideration to the element of what the traffic will bear in the light of the competition from private automobiles (page 231), and in our summary of fact findings said (page 255):

9. Changed economic conditions, including reduced commodity prices and average income, together with the generally cheaper cost and greater convenience of travel by highway, have so affected the value of the rail passenger service to the public that a fare basis which was a reasonable maximum before severe highway competition, and especially before the fall in recent years in commodity prices and average income, is out of harmony with present-day conditions.

Economic conditions since then have greatly changed, and the railroads today, instead of trying to attract passenger traffic, are endeavoring to discourage unnecessary travel, and are cooperating with the Office of Defense Transportation in its effort to avoid the rationing of passenger travel. As hereinabove mentioned, in our order of January 21, 1942, we found that the increased fares would be reasonable, and affirmed that finding in our report of March 2, 1942. In a report on further hearing, 255 I. C. C. 357, decided April 6, 1943, wherein we suspended the operation of the increases that had been authorized on freight rates, we declined to suspend their operation on passenger fares. We there found, at pages 394-5:

Governmental authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or is for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel.

We found, further, that passenger traffic had failed for many years to pay its proper share of railway expenses, and that only with a large volume of passenger traffic was the 1942 passenger deficit currently eliminated as to most of the railroads. Respondents herein presented statistics of their revenues, expenses, and income, together with other data, designed to support that finding as to them.

The aggregate net railway operating income or deficit from passenger operations of the five principal respondents in No. 29036 for recent years was as follows:

1936, deficit	$10,997,768
1937, deficit	10,231,812
1938, deficit	12,916,499
1939, deficit	12,464,628
1940, deficit	12,548,190
1941, deficit	3,436,130
1942, income	24,630,302
Average, deficit	5,423,532

Two of these respondents [2] had a deficit from passenger operations in 1942. The freight and passenger operating ratios, respectively, of 6 of the respondents in that proceeding averaged as follows: 1936, 65 and 120; 1937, 67 and 117; 1938, 67 and 125; 1939, 64 and 124; 1940, 64 and 123; 1941, 60 and 101; and 1942, 55 and 63.

The passenger operating revenues of the five principal respondents in that proceeding during the 12 months ended October 31, 1943, were substantially greater than those for the year 1942. As estimated by witness for the Price Administrator, the passenger operating ratio of those respondents and of respondents Louisville & Nashville and Norfolk and Western Railway Company for the first 9 months of 1943, unlike that for 1942, was somewhat more favorable than the freight operating ratio of these roads for the same period. That protestant also submitted evidence intended to show that, on their combined freight and passenger operations for the 12 months ended October 31, 1943, these seven respondents are earning before Federal income taxes more than a fair return on various book investment bases computed by his witness, and are not in need of the additional revenue which the proposed increased intrastate fares are expected to produce.

The net railway operating income from passenger operations of the 12 principal respondents in No. 28963 is shown below:

1936, deficit	$30,134,958
1937, deficit	27,420,877
1938, deficit	32,463,299
1939, deficit	31,758,549
1940, deficit	32,933,304
1941, deficit	19,426,424
1942, income	31,566,377
Average, deficit	20,341,576

Two of these respondents [3] had a deficit in 1942. The freight and passenger operating ratios, respectively, of

[2] Carolina, Clinchfield and Ohio Railway, $84,990; Norfolk Southern Railway Company, $134,600.

[3] Atlanta, Birmingham and Coast Railroad Company, $345,762; Gulf, Mobile & Ohio, $592,468.

these 12 respondents averaged as follows: 1936, 67 and 126; 1937, 69 and 121; 1938, 68 and 128; 1939, 66 and 128; 1940, 67 and 127; 1941, 62 and 107; and 1942, 58 and 68. The passenger operating ratio of 1943 was lower than for 1942.

The aggregate net railway operating income from passenger operations of the seven principal respondents in No. 29000 was as follows:

1936, deficit	$22,763,721
1937, deficit	21,078,023
1938, deficit	24,220,376
1939, deficit	24,189,043
1940, deficit	25,748,961
1941, deficit	18,387,738
1942, income [1]	11,118,537
Average, deficit	17,895,617

The freight and passenger operating ratios, respectively, of these respondents averaged as follows: 1936, 59 and 128; 1937, 63 and 130; 1938, 62 and 131; 1939, 61 and 132; 1940, 60 and 136; 1941, 57 and 115; and 1942, 56 and 74.

The aggregate net railway operating income from passenger operations of the eight principal respondents in No. 29037 appears below:

1936, deficit	$19,290,859
1937, deficit	17,838,577
1938, deficit	19,566,771
1939, deficit	19,972,298
1940, deficit	21,587,906
1941, deficit	14,225,973
1942, income	11,802,470
Average, deficit	14,239,972

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[1] Respondents' exhibit shows a deficit for the Chesapeake & Ohio Railway Company of $1,562,533. However, the annual report of that respondent to this Commission shows a profit of $434,381.

Four of these respondents [4] had a deficit in 1942. The freight and passenger operating ratios, respectively, of eleven of the respondents in No. 29037 averaged as follows: 1936, 65 and 129; 1937, 68 and 124; 1938, 66 and 131; 1939, 65 and 132; 1940, 64 and 133; 1941, 60 and 111; and 1942, 58 and 72.

The passenger coach revenues of all class I railroads in the southern region [5] for the first 7 months of 1943 were substantially in excess of those for the corresponding months of 1942 and 1941, and the increases in the revenues from coach traffic were greater than the increases during the same period in the revenues of these railroads from sleeping and parlor car fares. So, also for the first 10 months of 1943, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument, the increase in the passenger coach revenues of these carriers over those for the corresponding period of 1942 was 128.5 percent, as compared with an increase of 30.2 percent in the parlor and sleeping-car revenues.

The statistics in the regular monthly reports as made to us by the class I railroads were made a part of the record by stipulation at the oral argument. The latest of such reports now on file with and available to us are for the month of December 1943. Compared with the same month in 1942, that month resulted in an increase of 0.2 percent in freight revenue and 32.8 percent in passenger revenue for the southern region and 7.4 and 27.2 percent, respectively, for the country, but in a reduction in net railway operating income from all rail operations of 61.4 percent for the southern region and 55.9 percent for the country. For the year 1943, the increase over 1942 was 13.3 percent in freight

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[4] Illinois Central, $578,425; Tennessee Central Railway Company, $84,185; Gulf, Mobile & Ohio; and Clinchfield.

[5] The boundaries of the southern region are generally the same as those of southern passenger association territory, except that the southern region does not embrace any portion of Virginia or West Virginia.

revenue and 67.9 percent in passenger revenue for the southern region and 14.1 and 60.8 percent, respectively, for the country, but the net railway operating income fell below that for 1942 by 9 and 8.3 percent, respectively. The monthly increases over the corresponding months of the preceding year in the passenger revenues of the railroads of the country, including those in the southern region, have been quite steadily declining. Thus in July 1943, that increase was 74.4 percent for the southern region and 70.4 percent for the country, and in December of that year it was 32.8 and 27.2 percent, respectively. Also, the net railway operating income has steadily declined from a deficit compared with that for the same month of the preceding year of 12.1 percent for the southern region and 9.7 percent for the country in July, to 61.4 and 55.9 percent, respectively, for December; so that, due to increased expenses and taxes, the net railway operating income of the railroads in the southern region dropped from $28,578,717 in December 1942 to $11,035,492 in December 1943.

During recent years, the principal respondents herein have expended large sums of money in remodeling and air-conditioning their passenger equipment. For example, the Southern has air-conditioned or purchased new, with air-conditioning facilities, 189 coaches. It has purchased 6 two-car Diesel units and 16 Diesel-powered locomotives for passenger-train service. The Seaboard has air-conditioned and modernized 71 coaches and 23 combination passenger and baggage cars and 33 dining cars.

Wartime operations have placed added burdens on the passenger departments and facilities of respondents and have resulted in unusual expenses, such as for safeguarding operations and providing expedited movements of troop trains. For example, during November 1943, the Southern operated 353 troop trains, and 1,178 cars with troops were operated by it in regular trains. A special representative of the railroad rides each troop train. Much deadhead movement of equipment is necessary in assembling cars for these troop movements and in returning them to the points where they will again be needed, and additional terminal switching costs are incurred. Troop movements

are given preference over all freight trains and certain passenger trains, and this occasions delays to freight and passenger trains, with resulting increased costs in wages and fuel therefor. Some of these expenses are reflected in the freight accounts of respondents. Their general offices must be kept open in some instances 24 hours a day and in others from 12 to 16 hours in order to make provision for troop movements, thus requiring the services of a greater number of employees and resulting in increased expenses. On troop movements the Government does not pay the full published fare, but is allowed a discount of 5 percent from commercial fares, except where the movement is by a route over which land-grant deductions are applicable, in which event the deduction allowed is 50 percent of the commercial fare, plus a further deduction of 3 percent. There is no land-grant mileage in North Carolina, Kentucky, or Tennessee, but there is considerable such mileage in Alabama.

The large increase in passenger traffic has made necessary a marked expansion of ticket-selling forces. Most of the through trains are operated in two sections, requiring the use of two full crews; additional ticket helpers and porters have been employed on all through trains; and at the principal passenger terminals train-dispatching platform, switching, roadway, mechanical, and equipment-repair forces have been greatly augmented. Because of the war, respondents are experiencing great difficulty in obtaining competent help.

The average hourly rate of compensation in 1942 of all employees of the principal respondents in these proceedings ranged from about 24 to 27 percent higher than in 1936. At the time of the hearings there were pending demands by the railroad operating and nonoperating unions for wage increases, including the retroactive application of certain of such increases to February 1, 1943. We may notice officially that wage increases have since been granted and are now being paid. Since we prescribed the 2-cent basic coach fare as reasonable in 1936, there has been a substantial increase in the cost of materials and supplies used by railroads in the southern region, ranging from 22 percent for iron and

steel products to 48 percent for lumber and other forest products. Also, since then the railway-tax accruals of respondents have greatly increased. For example, those of the 14 respondents in No. 28963 increased, in round figures, from $34,400,000 in 1936 to $170,500,000 in 1942, or by 395 percent. Such accruals apportioned to the passenger service of 12 of those respondents, under our formula, increased in those years by 244 percent.

On or about October 1, 1942, upon request of the Government, respondents and other railroads generally established for both interstate and intrastate travel reduced round-trip coach fares on the basis of 1.25 cents a mile, available only to personnel of the Army, Navy, Marine Corps, Coast Guard, Women's Naval Reserves, Women's Army Corps, Women's Coast Guard Reserves, and Women's Marine Corps Reserves, traveling in uniform and at their own expense when on official leave, furlough, or pass; also to nurses when not traveling in uniform, upon presentation of proper identification, and under similar conditions to personnel of the military forces of the allied nations. Respondents do not propose to increase any of those fares.

The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads of the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte No. 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943, such as inductions into the armed forces of great numbers of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movement of Army troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary.

In July 1943, the North Carolina Utilities Commission filed with us a petition for a general investigation on our

own motion of the lawfulness of the interstate coach fares to, from, and through North Carolina. That petition, together with petitions dated July 31, 1943, of the Price Administrator and August 27, 1943, of the Alabama Public Service Commission for a general investigation of the reasonableness, under present conditions, of the interstate coach fares of all of the railroads in southern territory, was denied by our order of October 11, 1943. The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra*, plus the 10-percent increase authorized in Ex Parte No. 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents.

The Relation of the Intrastate Fares

The intrastate fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions about to be mentioned, were on the same basis as the interstate fares for more than 34 years prior to October 1, 1942. From April 1, 1908, to June 9, 1918, the basis of the one-way intrastate and interstate fares was 2.5 cents a mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, that fare basis was increased to 3 cents and so remained until August 26, 1920. On that date, the interstate fare, and shortly thereafter the intrastate fares, became 3.6 cents in all classes of equipment, plus a surcharge for passengers traveling in sleeping and parlor cars of 50 percent of the charge for space occupied in such cars. This basis was continued until the above-mentioned

experimentation with lower fares began in 1932 and 1933, and thereafter until October 1, 1942, the intrastate fares in all four of these States were generally on the same basis as the interstate fares.

On October 1, 1942, as stated, the interstate one-way fares became 2.2 cents in coaches and continued at 3.3 cents in sleeping and parlor cars, and the round-trip fares became 180 percent of the one-way fares with a return limit of 3 months for coaches and 166⅔ percent of the one-way fares with a return limit of 3 months for parlor and sleeping cars. These are the interstate fares now in effect.

The Alabama intrastate one-way fares of respondents were, on October 1, 1942, and still are, 3.3 cents in sleeping and parlor cars and 1.65 cents in coaches, except that the Gulf, Mobile & Ohio, Illinois Central, and St. Louis-San Francisco maintain coach fares of 2.2 cents other than in instances where they meet the 1.65-cent fare of competing lines. On or about October 26, 1942, respondents in No. 28963 filed with the Alabama Public Service Commission tariffs to become effective December 1, 1942, to increase the basic one-way coach fare to 2.2 cents, making it uniform with that applicable for interstate travel, and to make effective intrastate the round-trip fares which had been established uniformly for interstate application on October 1. This proposal included cancelation of the 30-day limit round-trip fares then in effect intrastate on the basis of 2.475 cents per mile and the 6-month limit round-trip fares on the basis of 2.75 cents per mile, both good for transportation in sleeping and parlor cars; also cancellation of the 15-day limit round-trip coach fares on the basis of 1.485 cents per mile and the 60-day limit round-trip coach fares on the basis of 1.65 cents per mile. The Alabama commission suspended operation of the tariffs and after a hearing issued its report and order on January 15, 1943, canceling the suspended tariffs and denying respondents' proposal to make such fares and charges effective on intrastate traffic in Alabama.

The Kentucky intrastate one-way coach fares of respondents were on October 1, 1942, and still are, 1.65 cents, except that the Gulf, Mobile & Ohio and Illinois Central main-

tain coach fares of 2.2 cents other than in instances where they meet the 1.65-cent fare of competing lines, and the Chesapeake & Ohio maintains a fare of 2.2 cents, except on its Louisville-Winchester line. Respondents in No. 29000 filed with the Railroad Commission of Kentucky tariffs to become effective December 1, to increase the basic one-way coach fare to 2.2 cents, making it uniform with that applicable for interstate travel, and to make effective intrastate the round-trip fares which had been established uniformly for interstate application on October 1. This proposal included cancelation of the 15-day limit round-trip coach fares on the basis of 1.485 cents per mile and the 60-day limit round-trip coach fares on the basis of 1.65 cents per mile, and substitution therefor of the 3-month limit round-trip fares on the basis of 1.98 cents per mile. The Kentucky commission suspended operation of the tariffs, and after a hearing issued its report and order on May 31, 1943, denying respondents' proposal to make such one-way and round-trip coach fares and charges effective on intrastate passenger traffic in Kentucky, but approving proposed changes in round-trip fares for transportation in sleeping and parlor cars.

By petition filed October 12, 1942, with the North Carolina Utilities Commission, the several railroads operating in North Carolina, with the exception of the Norfolk & Western, sought authority to increase the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars in that State to the level of the interstate fares. The intrastate one-way and round-trip coach fares of the Norfolk & Western, which has about 100 miles of railroad in North Carolina, are the same as the interstate fares. The North Carolina commission, by report and order of July 8, 1943, approved the proposed changes in the round-trip fares in sleeping and parlor cars, but deferred decision on the proposal to increase the fares in coaches pending further administrative action by it. As a result of that order, the present intrastate one-way coach fares in North Carolina are 1.65 cents a mile; and the intrastate round-trip coach fares in that State are 1.485 cents a mile with a return limit of 15 days, and double the one-way fare with a return limit of 60 days.

In Tennessee, the operation of the tariffs published by the railroads proposing to increase all lower intrastate fares in that State to the level of the corresponding interstate fares was suspended by the Railroad and Public Utilities Commision of the State of Tennessee, and by its report and order of August 30, 1943, that commission denied the railroads' proposal. As a result, the present intrastate one-way coach fares in Tennessee are 1.65 cents a mile, except that the one-way coach fares of the Illinois Central, Gulf, Mobile & Ohio, and St. Louis-San Francisco are 2.2 cents, other than in instances where they meet the 1.65-cent fare of competing lines. The intrastate round-trip coach fares are 1.485 cents a mile with a return limit of 15 days, and double the one-way fare with a return limit of 60 days. The intrastate round-trip sleeping and parlor-car fares are 2.475 cents a mile with a return limit of 30 days, and 2.75 cents a mile with a return limit of 6 months.

Section 13 (4) confers upon us the power to raise intrastate rates or fares to the reasonable interstate level upon a showing that the intrastate rates or fares cause either undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

Undue advantage, preference, or prejudice.—Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers. Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances. The differences in favor of the intrastate passengers range from 22 cents for 40 miles to $1.90 for 347 miles in coaches in each of the four States, and somewhat less in sleeping and parlor cars in Alabama and Tennessee. Thus, for example, from Columbus, Miss., to Anniston, Ala., 186 miles, the coach fare is $4.11, and from Sheffield, Ala., to Anniston, 193 miles, it is $3.30, a difference of 81 cents; from Lexington, Ky., to Columbus, Ohio, 197 miles, the fare is $4.44, as compared with a fare of $3.35 from Lexing-

ton to Owensboro, Ky., 199 miles, a difference of $1.09; from Charlotte, N. C., to Spartanburg, S. C., 75 miles, the fare is $1.65, whereas from Charlotte to Greensboro, N. C., 94 miles it is $1.55, a smaller fare intrastate by 10 cents for a greater haul by 19 miles; from Chattanooga, Tenn., to Asheville, N. C., 240 miles, the fare is $5.32, and from Chattanooga to Bristol, Tenn., 242 miles, the intrastate fare is $4.05, a difference of $1.27.

So, also, illustrations are of record showing differences between the fares over interstate and intrastate routes between points in the same State. Thus, between Piedmont, Ala., and Hurtsboro, Ala., the fare is $5.21 over the interstate route, 235.9 miles, and $4.05 over the intrastate route, 236.9 miles, a difference of $1.16. Between Memphis, Tenn., and Knoxville, Tenn., the fare over the interstate route is $9.39, and over the longer intrastate route it is $7.10, a difference of $2.29. Similar situations are exhibited with respect to the round-trip fares. They exist in each of the four States where and to the extent that the intrastate fares are on a lower basis than the interstate fares. It would serve no useful purpose to multiply such illustrations, for all are based upon the fact that the interstate fares are made on the basis of 2.2 cents per mile, while the intrastate fares are based on 1.65 cents per mile.

All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same. The illustrations above given are typical of a condition which exists in some degree between interstate and intrastate passengers on every mile of track operated in passenger service by each of the respondents in all four of these States, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same.

Unjust discrimination.—On the basis of audits made for representative periods by the principal respondents in each of these proceedings, the estimated amount of additional revenue which the respondents in the respective States would have received during those periods if the assailed intrastate fares had been on the interstate level, projected

over the period of a year, exceeds $750,000 per annum in Alabama, $526,000 in Kentucky, $558,000 in North Carolina, and $556,000 in Tennessee.

The intrastate fares in each of the States may be used to defeat or break down the interstate fares, and thereby reduce the revenues on interstate traffic. Thus, passengers destined to points outside the respective States may now purchase intrastate tickets to points on or near the State line and either rebuy tickets or pay cash for the remainder of the journey. Technically, they break their journey when they leave the train at the points on or near the State line to purchase tickets for beyond the State, but practically they resort to a device which defeats the through fares. Typical illustrations are of record for each of the States, but one will suffice: The interstate coach fare between Raleigh, N. C., and Knoxville, Tenn., over the Southern is $8.91; the intrastate coach fare from Raleigh to Hot Springs, N. C., is $5.25, and that from Hot Springs to Knoxville is $2.05. By purchasing an intrastate ticket from Raleigh to Hot Springs and either purchasing a ticket at Hot Springs or paying cash for the remainder of the journey, a passenger traveling from Raleigh to Knoxville can thus save $1.61. So also, of course, passengers can avoid paying the higher interstate fares by using the cheaper intrastate routes between points in the same State, in instances such as those above referred to from and to which there are both interstate and intrastate routes.

Specific evidence that the intrastate fares have been and are being used to defeat or avoid payment of the interstate fares in particular instances was not submitted, and admittedly is difficult to obtain. Respondents, however, are convinced that these practices are common; that their elimination would have an important effect upon the additional revenues which they would receive if the intrastate fares were on the same level as the interstate fares; and that they can be eliminated only by establishing such a parity.

An increase in the intrastate fares to the interstate level under existing conditions, respondents insist, will not result in any important loss of traffic to other forms of transportation and will produce increased revenues substantially equivalent to those estimated by them.

Protestants' contentions and evidence—Alabama.—Protestant Alabama Public Service Commission, by three State employees, two of whom are its own field inspectors, offered evidence of the crowded condition of trains, and the large number of passengers who as a result were required to stand. From this evidence protestant argues that the persons seated must have been interstate passengers, and that intrastate passengers receive an inferior service. One of the witnesses rode in the coaches of a Louisville & Nashville train from Mobile to Montgomery, Ala., every alternate Friday night, and for the preceding 3 months had not been able to obtain a seat. It was not shown that the train had not stopped at other Alabama stations before reaching Mobile, nor that other intrastate passengers boarding the train at Mobile did not obtain seats. It may be that on this particular train more long-haul, and hence more interstate, passengers than intrastate passengers were seated on the trip from Mobile to Montgomery. But the suggestion that the service accorded to intrastate passengers generally in Alabama on interstate trains is inferior to that accorded to interstate passengers is not supported by the evidence of record.

The present intrastate fares in Alabama appear to be somewhat higher than bus fares from and to the same points. From Birmingham to 12 destinations the average rail coach fare is $1.5275, the average proposed fare is $1.9975, and the average bus fare is $1.425; from Montgomery to 8 destinations the respective average fares are $1.985, $2.616, and $1.893. While the tendency of an increase in the coach fares, without a corresponding increase in the bus fares, would be to drive traffic to the busses, the latter are already experiencing as great or greater congestion than the trains.

Protestant points out that much of the added expense of the operations of some of respondents arises in connection with or is due to the movement of troop trains, and that these are interstate movements; and it contends that civilian intrastate fares should not be increased to assist in bearing that burden. To concede the correctness of this contention might be to impair the effectiveness of the provisions of section 15a relative to adequate and efficient rail-

way service, and to defeat the national transporation policy as declared in 54 Stat. L. 899, relative to developing, coordinating, and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense, and requiring that all of the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the stated declaration of policy.

Kentucky.—Protestant Railroad Commission of Kentucky shows that the present intrastate one-way fares between representative points average 14.7 percent higher, and the proposed fares 40.7 percent higher, than the one-way bus fares from and to the same points, and the present and proposed round-trip fares average 9 and 41 percent higher than the round-trip bus fares. Differences in rail and bus fares are sometimes due to differences in distance.

Passengers traffic and revenues therefrom in Kentucky have increased in recent years, as indicated by reports of the 5 respondents in No. 29000 having approximately 96 percent of the total railroad mileage in Kentucky. Passenger revenues earned in Kentucky on intrastate and interstate traffic were $4,182,411 in 1939, $4,493,479 in 1940, $6,497,525 in 1941, and $14,023,436 in 1942. Passengers carried by the same railroads and for the same years were 2,925,085, 3,065,609, 3,931,378, and 6,633,604. Passenger-miles increased from 230,594,000 in 1939 to 723,909,000 in 1942. The average number of passengers per car-mile was 10.6 for 1939 and 22.3 for 1942. As indicating the proportion of passenger revenues accruing in Kentucky which is derived from intrastate traffic only, for the Louisville & Nashville in 1939 the total was $2,200,241 and the intrastate $519,726, while the corresponding revenues for the Chesapeake & Ohio were $682,716 and $146,987.

Turning to the system figures for the seven principal respondents, following is a comparison of 1942 and 1943, from the record as supplemented by stipulation of counsel at the argument: Freight revenues, $684,523,687 and $763,303,989; passenger revenues, $101,210,404 and $177,785,481; total operating revenues, $827,410,532 and $993,210,774; total operating expenses, $485,698,121 and $577,890,293; operat-

ing ratio, 58.7 and 58.2; and net railway operating incomes, $156,601,762 and $149,784,991.

Protestants point out that these seven respondents in the last 2 years have been able to take care of their increases in operating expenses and railway tax accruals, and still show consistent and substantial increases in their net railway operating income. The relation of net railway operating income to investment in railway property including cash, materials, and supplies, for these respondents reflects average rates of return, after Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; and 1942, 5.78 percent.

The Price Administrator, on behalf of himself and the Director of Economic Stabilization, opposes any increase in fares. He relies upon the facts that when passenger service was furnished at a loss, this Commission approved general levels of freight rates which took into consideration these passenger losses, *Fifteen Percent Case, 1937-1938,* 226 I. C. C. 41, 54; that these returns from freight traffic have been multiplied during the war by greatly increased freight traffic; and that the passenger service itself is now returning a profit. It is therefore contended that either the passenger fares or the freight rates should be reduced.

If freight traffic is now producing more than a fair return for the above-mentioned or any other reason, it may be dealt with in an appropriate proceeding. The evidence here before us does not indicate that the passenger traffic of these respondents as a group is producing more than a fair return.

North Carolina.—In its brief and upon oral argument the North Carolina commission contends that respondents in No. 29036 erred as a matter of law, in that they failed to exhaust their remedies before that commission prior to filing their section 13 petition with us, on the ground that its order was interlocutory in form and was so issued in order that it might file with us the petition before-mentioned for investigation of the interstate coach fares. It asserts that the matter was and still is open for consideration by it. The instant proceeding was not instituted until after we had fully considered the petition of the North Carolina commis-

sion and had denied that petition. In view of this fact, and of the time which has elapsed since respondents petitioned that commission on October 12, 1942, for authority to increase the intrastate coach fares in that State, we do not believe that we would be justified in deferring action in this proceeding and requiring respondents to renew their efforts before that commission for authority to increase these fares. Moreover, the issues presented for our consideration here differ in important respects from those which are within the jurisdiction of that commission, and our duty under the Interstate Commerce Act, as we see it, is to decide these issues on the record now before us.

This protestant contends that the intrastate coach fares in that State properly should be on a lower level than the interstate fares, and that the existing disparity between these fares does not result in undue preference or prejudice, nor in unjust discrimination against interstate commerce. A similar contention is made by protestants Charlotte Shippers and Manufacturers Association and the North Carolina Division of the Travelers Protective Association of America. The position of these protestants is that the intrastate coach service in North Carolina has deteriorated and is inferior to the interstate coach service in that State. Three of the principal respondents operate a limited number of modern streamlined air-conditioned coach trains on which seats are reserved without charge in addition to the basic fare, and these trains make scheduled stops in North Carolina only at the principal cities. These protestants contrast the equipment and service afforded by those trains with the less desirable equipment and service afforded by certain local trains of some of respondents in that State. They give examples of the crowding of coaches on the latter trains far beyond their seating capacities and of the operation of such coaches in an untidy condition. The equipment and service of the streamlined coach trains is also contrasted with the service on certain branch lines of one of respondents, which is provided in each instance by mixed trains of a number of freight cars and an antiquated combination passenger-and-baggage or passenger-and-mail or express car.

Passenger traffic on most of these branch lines is light. Crowded coaches are not peculiar to intrastate travel in North Carolina, but are common also in interstate travel in that and other States in southern territory, as well as in all other sections of the country. Passengers frequently litter the cars with paper and other refuse, and thereby contribute to the untidy condition of the cars; and the crowded condition of the cars makes difficult and often impracticable the task of keeping them clean enroute. Wartime travel by railroad has resulted in such a demand for passenger coaches that every available coach is being used, and upon their arrival at the terminals, time and labor are not always sufficient to permit cleaning the coaches as thoroughly as in normal times. Admittedly, interstate as well as intrastate passengers may and do travel on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accommodations and service furnished intrastate passengers.

The Price Administrator contends that the proposed increase in fares is inconsistent with the wartime stabilization program; further, that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if we should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares.

In *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, and in the report on further hearing in *Increased Railway Rates, Fares, and Charges, supra*, we discussed contentions that rate increases therein proposed would be inconsistent with the efforts of the Government to avoid inflation and would conflict with the provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Act, and executive regulations thereunder. We concluded that the provisions of these acts, except those pertaining to the giving of notice and consent to intervene to the designated Federal agent, made no changes in or additions to the Interstate Commerce Act with respect to the rates, fares, and charges of common carriers by railroad. The provisions of these acts respecting the

giving of notice and consent to intervene to the designated Federal agent have been complied with in each of these proceedings.

The evidence bearing upon the further contention of the Price Administrator has been recited hereinbefore.

Tennessee.—The Tennessee commission contends that the standards of transportation offered intrastate passengers in Tennessee do not conform, on the average, to those offered interstate passengers in that State, and that for this reason intrastate and interstate passengers in that State are not transported under substantially similar circumstances and conditions.

On each of the branch lines of respondent Nashville, Chattanooga & St. Louis, passenger service is provided by a mixed train consisting of a number of freight cars and a passenger coach, which is used also by some of the train crew in lieu of a caboose. The schedules on which such trains are operated are governed primarily by the amount of freight service to be performed. Six of these branch lines, comprising somewhat more than a third of the total mileage of this respondent in Tennessee, are wholly within that State. The coaches used on these lines are old and second grade in accommodations and maintenance. Passenger service on the main lines of this respondent, and of other respondents, is provided generally by scheduled passenger trains, including a number of modern streamlined all-coach trains or combination streamlined coach and pullman-car trains of generally first-grade accommodations and maintenance. Three streamlined all-coach trains are operated through Tennessee, each on alternate days, one over the lines of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, another over the Illinois Central, and a third over the Louisville & Nashville. These trains makes regularly scheduled stops in Tennessee, other than at Nashville, only to take on passengers destined to certain points outside of the State or to discharge passengers coming from such points. The coaches of these trains are air-conditioned, seats are reserved without charge in addition to the regular fare, and some of these trains carry lounge or observation cars which in normal times

are available to coach passengers. One combination coach and pullman-car train also makes regularly scheduled stops at only two points in Tennessee, one of such stops being limited to passengers destined to or coming from points beyond the State. The other such train makes regularly scheduled stops at a number of points in Tennessee.

Respondent Nashville, Chattanooga & St. Louis operates six passenger trains daily over its main line in each direction between Nashville and Chattanooga. One of these is the streamlined all-coach train mentioned above. Of the remaining five, one is a local train which stops at practically all intermediate points, and the other four are express trains which stop at a limited number of intermediate points and at some of them only on signal. The Nashville, Chattanooga & St. Louis and the Tennessee Central operate air-conditioned so-called chair or cafe coaches on certain of their trains between a number of points in Tennessee in which seats may be reserved at an extra charge in addition to the regular fares.

With the exception of the streamlined trains operated by certain of them, the equipment and service offered intrastate and interstate passengers in Tennessee by the other respondents and on other lines of the Nashville, Chattanooga & St. Louis in that State are not described of record.

Interstate as well as intrastate passengers may and do travel on the mixed trains described above, and the facilities and service furnished interstate passengers in such circumstances are the same as the facilities and service furnished intrastate passengers. The Nashville, Chattanooga & St. Louis also operates two interstate branch lines between certain points in Tennessee and certain points in Alabama, and passenger service on these lines is also provided by mixed trains.

The evidence contrasting the facilities and service available chiefly to interstate passengers on a limited number of modern streamlined air-conditioned coach trains with the facilities and service available to intrastate passengers on certain of the main lines of one of respondents is insufficient to establish that the standards of transportation afforded intrastate coach passengers in Tennessee, on

an average, differ materially from those afforded interstate coach passengers in that State. At best, it shows that some of the trains operated in that State are superior to others, a situation which obviously is not peculiar to Tennessee alone.

Discussion and Findings

The transportation conditions bearing upon the reasonableness of the interstate fares have not changed materially since the adoption on April 6, 1943, of our report on further hearing in Ex Parte No. 148, wherein we declined to disturb our prior finding that the increased interstate fares then and now in effect were just and reasonable. Upon the records in the instant proceedings, we can find no warrant for changing our views that a basic coach fare of 2 cents per mile, plus an additional 10 percent for the duration of the war, is reasonable for general application. Such a fare is now in effect for one-way application generally throughout the country, except intrastate in the four States the fares in which are here before us. Also, the respective round-trip fares for application in coaches and in sleeping and parlor cars are uniform generally throughout southern territory, except intrastate in these four States on traffic in coaches and intrastate in Alabama and Tennessee on traffic in sleeping and parlor cars.

Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States. The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wisconsin R. Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide, and is similar in every respect to that before us in *Rhode Island Commutation Fares*, 253 I. C. C. 383, and in *Increases in Texas Rates, Fares, and Charges*, *supra*.

The revenue lost to respondents in each of these States by reason of the lower intrastate fares is substantial, and the transportation conditions under which the intrastate service is performed do not differ materially from those under which the interstate service is performed. Section

13 (4) of the act empowers us to increase intrastate rates or fares so that the intrastate traffic may produce its fair share of the earnings required by the respondent carriers to enable them to provide adequate and efficient railway transportation service, both interstate and intrastate. *United States* v. *Louisiana, supra,* page 75; *Florida* v. *United States,* 292 U. S. 1; *Illinois Commerce Comm.* v. *United States,* 292 U. S. 474. "The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried • • • under substantially the same conditions." *Illinois Commerce Comm.* v. *United States, supra,* page 485.

We find that——

1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.

2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding.

3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from, and through those respective States on the other, are substantially similar.

4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intra-

state passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers.

5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service.

6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from, and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State.

The foregoing findings are without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act.

In accordance with our practice in such proceedings, we shall leave to respondents and the respective State commissions the matter of adjusting the intrastate fares to conform to these findings. If this is not accomplished within 30 days from the service of this report, consideration will be given to the entry of an appropriate order.

SPLAWN, *Commissioner*, dissenting:

In my judgment the decision of the majority on the evidence in these proceedings goes beyond our lawful power under section 13 (4). This view, I think, finds full support in several decisions by the Supreme Court of the United States in which the Court has had occasion to review some of our reports and orders under that section.

It should be emphasized that our authority under section 13 (4) to require increases in intrastate rates springs from and is an incident of the duty to regulate and protect interstate commerce. In exercising that power to nullify State authority we should be guided by the following wise and well-settled principles or standards which have been announced by the Supreme Court: (1) That this Commission has no general authority to regulate intrastate rates; (2) that the provision of section 13 (4) prohibiting unjust discrimination against interstate commerce is to be considered in connection with section 15a; (3) that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear; and (4) that the mere existence of a disparity between rates on intrastate and interstate traffic does not warrant our prescribing, intrastate rates. *Florida* v. *United States*, 282 U. S. 194, 211-212.

These proceedings present two questions. First, do the intrastate passenger fares imposed by authority of these States cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand? And second, do the intrastate fares cause any undue, unreasonable, or unjust discrimination against interstate commerce?

In considering the first question it is important to observe that the prohibition against undue prejudice and preference as between persons and localities in interstate and intrastate commerce in section 13 (4) is substantially the same as the prohibition against undue prejudice and preference contained in section 3 (1). The principal difference between the two provisions is that section 3 (1) prohibits a *carrier* from giving an undue preference or causing an undue prejudice, while section 13 (4) prohibts any intrastate *rate, fare,* et cetera from causing the undue preference or undue prejudice. In view of the similarity of the language employed in the two provisions, we have said that evidence to sustain an order and finding that intrastate rates are violative of section 13 (4) in that they unduly prejudice persons or localities must be of equal dignity and probative value as the evidence required to sustain a finding under section 3 (1). *Barrett Co.* v. *Atchison, T. & S. F. Ry. Co.*, 172 I. C. C. 319, 334. The soundness of that rule is evident, for both provisions are directed against the same evils, namely, undue prejudice and undue preference as between localities and persons.

We have frequently found that the mere existence of a disparity in rates does not warrant a finding of undue prejudice and preference under section 3 (1), and that ordinarily the evidence to support such a finding must establish that such prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another. To say that the evidence necessary to sustain a violation of the provision of section 13 (4) as to undue prejudice and preference as between localities and persons, can be of less dignity or less probative value than the evidence necessary to show a violation of section 3 (1) ignores completely the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear.

In support of their contention that the intrastate fares now maintained in these States cause undue prejudice and preference as between persons and localities, respondents rely upon (1) the similarity of the intrastate and interstate services, and (2) the differences in the fares.

The provision of section 13 (4) which deals with prejudice and preference as between persons and localities, as previously noted, corresponds to section 3 (1). Both of these provisions obviously are for the protection of persons and localities, and not primarily for the benefit of the carriers. The second provision of section 13 (4), which is discussed later herein, provides a complete remedy for the carriers in situations where intrastate rates, fares, et cetera, unlawfully discriminate against interstate commerce.

With respect to the situations in Kentucky and Alabama, for example, no persons who pay the higher interstate fares and no localities are appearing herein to complain of undue prejudice and preference, or without complaining, have testified that they are in any wise injured, and so far as these records disclose, none has complained to respondents. Under these circumstances we would not even have before us a complaint under section 3 (1), much less the evidence on which to base a finding of a violation of that section. Respondents do not ask relief for any particular persons or places, but seek State-wide orders.

In *Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, and *State of New York* v. *United States*, 257 U. S. 591, the Court held that orders entered by this Commission under section 13 (4) requiring horizontal increases of intrastate passenger fares throughout the States of Wisconsin and New York, to correspond with fares for like interstate service in the same States, could not be sustained as orders to remove undue prejudice and preference as between persons and localities. In the *Wisconsin case*, at page 580, in referring to the "sweep" of our order the Court said:

> It includes fares between all interior points although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted, can not give the

order validity. As said by this court in the *Illinois Central R. R. case*, [245 U. S. 493]: "It is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty." See also *American Express Co.* v. *Caldwell*, 244 U. S. 617, 627.

In this report it is stated that "The evidence in each of these proceedings, therefore, contrary to the situation dealt with in [the *Wisconsin case*], establishes a condition which is State-wide." "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States." Is it to be supposed that interstate passengers did not likewise ride on all trains to and from all branch and mainline points in Wisconsin? The cases are distinguishable, but in the following respect: In the *Wisconsin case* there was evidence that localities in Minnesota and Michigan in close proximity to localities in Wisconsin competed for the location of industries, and for retail trade, and to some extent for wholesale trade. This competition was affected by the lower State fares. In these cases there is no evidence whatever of competition or injury. The Court found that there was evidence which would support a finding of undue prejudice and preference against a large class of fares. As above indicated, objection to the Commission's order was that it was not restricted to the border points to which the evidence pertained, but that it included fares between all interior points although they might not be near the border and the fares between them might not work a discrimination against interstate travelers at all. To assume that the court supposed that interstate passengers did not travel to and from the interior points, and to attempt to distinguish the cases upon that ground, is to miss the real point of distinction, which is that in the *Wisconsin case* there was evidence going beyond a mere showing of a difference in rates for similar services, and which tended to show injury to interstate localities, while the records herein are devoid of evidence of injury.

If the order of the Commission there could not be sustained as an order to remove undue prejudice and preference as between persons and localities, what can be said in support of that phase of the State-wide orders herein which are unsupported by evidence beyond the mere difference in fares?

Turning now to the second question: Do the intrastate fares cause undue or unjust discrimination against interstate commerce? Here, respondents rely upon the loss of revenues which they contend has resulted from refusal of the State rate authorities to permit the intrastate fares to be increased to the interstate level. In Kentucky, for example, the estimated annual loss of revenue to all of the principal respondents in that State approximates $526,000.

Section 15a, which is intended, among other things, to insure a fair return for carriers provides that in the exercise of our power to prescribe just and reasonable rates we shall give due consideration, among other factors, to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. In the *Wisconsin case,* at page 586, the Court referred to the "dovetail relation" between the provision of section 13 (4) relating to unjust discrimination against interstate commerce and the purpose of section 15a, as it then stood, and pointed out that if that purpose is *interfered with* by a disparity of intrastate rates we are authorized to end the disparity by directly removing it. Continuing, at page 590 the Court stated that action by the Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce. It should be noted that at the time of the decision in the *Wisconsin case,* section 15a did not read the same as at present, but its general purpose was to secure to the carriers revenue sufficient to enable them to provide in the public interest adequate and efficient transportation service, the same as under the present provisions.

That something more than a disparity between interstate and intrastate rates is necessary to support a finding of

undue discrimination against interstate commerce is made quite plain in *United States* v. *Louisiana*, 290 U. S. 70, 74, 75, wherein the Court stated:

> By section 416 of the Transportation Act, section 13 (4) Interstate Commerce Act, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates. This Court has consistently held that this section is to be construed in the light of section 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. So construed, section 13 (4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *Wisconsin Railroad Comm'n* v. *C. B. & Q. R. Co. supra*, 586, 587, 588, 589, 590; *New York* v. *United States*, 257 U. S. 591, 601; *Florida* v. *United States, supra*, 211; *Louisiana* v. *United States*, 284 U. S. 125, 131; see *Nashville, C. & St. L. Ry. Co.* v. *Tennessee*, 262 U. S. 318.

In my judgment the evidence in these proceedings falls far short of establishing that the failure of respondents to receive the additional revenue, which would result from increasing the present intrastate fares to the interstate level, operates to *interfere with* or to *thwart* the broad purpose of section 15a to maintain an efficient transportation system. Nor can it be said that under present conditions the failure of the State Commissions to permit increases in the present intrastate fares constitutes an obstruction to interstate commerce.

In the Kentucky proceeding, for example, the relation of net railway operating income to investment in railway property including cash, materials, and supplies, for the seven principal respondents shows average rates of return,

after deduction of Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; 1942, 5.78 percent. In this connection it is of interest that based on 1940 valuations recommended by our Bureau of Valuation the average rates of return for the respective years indicated would be 4.18 percent, 5.31 percent, 5.57 percent, 7.81 percent, 8.50 percent, and 8.13 percent. The increase in net railway operating income for passenger traffic alone, 1942 over 1941, was $50,992,801 for the 12 class I respondents in the Alabama proceeding, and $29,506,275 for the 7 principal respondents in the Kentucky proceeding.

I wish to emphasize my disagreement with finding 5 in this report that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues *required* to enable respondents to render adequate and efficient transportation service. There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole. As a matter of fact it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by section 15a.

In each of these four States the State regulatory authority, after due consideration, authorized an increase of 10 percent on the going intrastate fares and declined to order or authorized a further increase to the interstate level. The fact that some of the adjoining States have permitted increases in intrastate fares to the interstate level is not binding upon the duly constituted authorities of these four States. The evidence in these proceedings does not sustain the contention that the maximum fares for interstate travel must also be the minimum fares for intrastate travel.

I am authorized to say that Commissioners Aitchison and Mahaffie join in this expression.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189. Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MANUFACTURERS ASSOCIATION, INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Plaintiffs.*

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMISSION, *Defendants*

DECREE

This cause coming on to be heard before the Undersigned, constituting a special District Court of Three Judges convened pursuant to 28 U. S. C. A. 47, upon an application for an interlocutory injunction; and being heard upon the evidence taken before the Interstate Commerce Commission and the Report of the Commission, as well as upon the arguments and briefs of counsel; and the cause, by consent of the parties, having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which are filed herewith:

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the opinion of the Court herewith filed, it is ordered, adjudged and decreed that the injunction and other relief

prayed for in the complaint be denied and that the suit be dismissed.

This the 20th day of July, 1944.

(S.) JOHN J. PARKER,
United States Circuit Judge, Fourth Circuit.
I. M. MEEKINS,
United States District Judge,
Eastern District of North Carolina.
JOHNSON J. HAYES,
United States District Judge,
Middle District of North Carolina.

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189. Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MANUFACTURERS ASSOCIATION, INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Plaintiffs.*

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

The Court makes the following findings of fact:

1. The Interstate Commerce Commission on March 25, 1944 filed its report and order, 258 I. C. C. 133, modified by order of May 8, 1944, requiring railroads serving the

State of North Carolina to establish and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares.

2. The effect of the order is to require the present basic coach fare in North Carolina of 1.65 cents per mile to be increased to the present interstate level of 2.2 cents per mile.

3. The Commission found the interstate coach passenger fares prevailing in North Carolina to be just and reasonable and this finding is supported by substantial evidence.

4. The Commission found that the conditions affecting interstate and intrastate transportation in the State of North Carolina were substantially similar and that the disparity between interstate and intrastate coach fares constituted discrimination in favor of intrastate passengers and against interstate passengers using the same facilities; and these findings are supported by substantial evidence.

5. The Commission found that the revenues of rail carriers in North Carolina are less by $525,000.00 per annum than they would be if intrastate fares were increased to the interstate level and that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable the rail carriers to render adequate and efficient transporation service; and this finding is supported by substantial evidence.

6. The Commission found that the maintenance of the lower intrastate coach fares in North Carolina causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable and unjust discrimination against interstate commerce; and that this unlawfulness should be removed by increasing intrastate fares to the level of interstate fares.

7. The Commission afforded full and fair hearing to plaintiffs and accorded to the Price Administrator full opportunity to be heard and present contentions under the Stabilization Act.

8. The Commission filed a report, 258 I. C. C. 133, setting forth its findings and analyzing the evidence in support thereof; and the basic findings as well as the ultimate findings therein contained are supported by substantial evidence.

CONCLUSIONS OF LAW

And the Court sets forth the following as its conclusions of Law:

1. The findings and order of the Commission are based on substantial evidence, do not involve any error of law and are not arbitrary or unreasonable.

2. The Commission properly required that railroads serving the State of North Carolina established and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares.

3. Injunction should be denied and the suit should be dismissed.

(S.) JOHN J. PARKER,
United States Circuit Judge, Fourth Circuit.
I. M. MEEKINS,
United States District Judge,
Eastern District of North Carolina.
JOHNSON J. HAYES,
United States District Judge,
Middle District of North Carolina.

APPENDIX "D"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189. Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MANUFACTURERS ASSOCIATION, INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Plaintiffs*,

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

ON APPLICATION FOR INJUNCTION

Argued July 12, 1944 Decided

Before Parker, Circuit Judge, and Meekins and Hayes, District Judges

J. C. B. Ehringhaus and F. C. Hillyer for State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., and North Carolina Division of the Travelers Protective Association of America; Richard H. Field, General Counsel, David F. Cavers, Assistant General Counsel, Bernard M. Fitzgerald, Transporation Counsel, Transporation and Public Utilities Division, and M. D. Miller, Attorney, Office of Price Administration, for Price Administrator; Charles Clark, General Attorney Southern Railway System, Frank W. Gwathmey and Joseph P. Cook for North Carolina Rail Lines; Leon Jourolmon, Jr., for Railroad & Public Utilities Commission of State of Tennessee; for Alabama Public Service Commission; and for Commonwealth of Kentucky. Edward Dumbauld, Special Assistant to the Attorney General, Wen-

dell Berge, Assistant Attorney General, J. O. Carr, United States Attorney, Daniel J. Knowlton, Chief Counsel and J. Stanley Payne, Assistant Chief Counsel Interstate Commerce Commission, for United States and Interstate Commerce Commission.

PARKER, *Circuit Judge*:

This is a suit under the Urgent Deficiencies Act (28 U. S. C. A. 43-48) to enjoin and set aside an order of the Interstate Commerce Commission requiring railroads serving the State of North Carolina to establish and maintain intrastate coach fares for passengers on buses no lower than the present interstate fares. The effect of the order is to require the present basic coach fare in North Carolina of 1.65 cents per mile to be increased to the present interstate level of 2.2 cents per mile. A special court of three judges has been convened pursuant to statute, intervention has been allowed on the part of various interested parties, and the case has been heard on the merits and submitted for final decree.

The findings of the Commission in support of the order, made in a proceeding relating to fares in the States of Alabama, Kentucky and Tennessee, as well as in North Carolina (Alabama Intrastate Fares 258 I. C. C. 133, 154-155), are as follows:

> "1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fare applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.
>
> "2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the coresponding fares applicable interstate and intrastate generally

throughout southern territory, except in the several States mentioned in this finding.

"3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from and through those respective States on the other, are substantially similar.

"4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers, and the undue and unreasonable disadvantage and prejudice of the interstate passengers.

"5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of revenues required to enable respondents to render adequate and efficient transportation service.

"6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee; and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid inter-

state fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from, and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State.

These ultimate findings of the Commission are supported by a detail discussion of the evidence before it, which need not be reported here, and by a review of the history of passenger rates since 1908, which because of its importance with relation to the fundamental questions here involved we quote as follows:

"In southern passenger association territory, hereinafter referred to as southern territory, which generally speaking, is that territory east of the Mississippi River and south of the Ohio and Potomac Rivers, the basis of one-way fares from April 1, 1908, to June 9, 1918, was generally 2.5 cents per mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, the fare was increased to 3 cents per mile in all classes of equipment. This fare remained in effect until August 25, 1920, but during the period June 10 to November 30, 1918, an additional charge of 16⅔ per cent of the one-way fare was assessed for travel in sleeping and parlor cars. From August 26, 1920, to November 30, 1933, the fare generally was 3.6 cents per mile in all classes of equipment, plus a surcharge on transportation in sleeping and parlor cars on and after December 1, 1918, of 50 per cent of the charge made for space occupied in such cars.

"During 1932 and 1933, certain of the carriers operating in Southern territory experimented with fares lower than 3.6 cents in attempts to attract additional passenger business in competition with transportation by private automobiles and in buses. For example,

from April 1 to November 30, 1933, experimental one-way fares of 3 cents per mile in sleeping or parlor cars, without a surcharge, and 2 cents per mile in coaches, were maintained by the Atlanta and West Point Railroad Company, The Western Railway of Alabama, Mobile and Ohio Rail Road Company (Now part of the Gulf, Mobile and Ohio Railroad Company). Louisville and Nashville Railroad Company, and The Nashville, Chatttanooga & St. Louis Railway. During the same period the Southern Railway system lines were experimenting with coach fares of 1.5 cents per mile on certain portions of their lines.

"On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5 cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and the St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees.)

"In Passenger Fares and Surcharges, 214 I. C. C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches, or pullman cars. The pullman surcharge was found unreasonable and its cancellation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful.

"On November 15, 1937, the carriers which had been maintaining the experimental coach fare of 1.5 cents increased that fare to 2 cents per mile, but restored the

1.5 cent fare on January 15, 1939. Again, certain of the southern lines, including the Illinois Central, Mobile and Ohio, St. Louis-San Francisco, and Norfolk and Western Railway Company, retained the 2-cent fare basis.

"By order of January 21, 1942, in Ex Parte No. 148, we found that a nation-wide increase of 10 per cent in fares proposed by the railroads was necessary to enable the petitioners to continue to render adequate and efficient transportation service during the national emergency, and that the proposed increased fares would be reasonable and otherwise unlawful. See Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 545, 565, 566, where the foregoing findings were renewed and affirmed.

"The reestablished coach fares of 1.5 cents remained in effect until February 10, 1942, on which date the 10 per cent increase in fares for transportation in both coaches and Pullman cars became effective. On that date fares of 1.5 cents became 1.65 cents; fares of 2 cents became 2.2 cents; and fares of 3 cents became 3.3 cents. The round-trip fares were modified to reflect the increase in the one-way fares. On various subsequent dates these increased fares also became effective on intrastate traffic in all of the States.

"On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. Having found in Passenger Fares and Surcharges, supra, that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines of petitioners, we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 per cent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority,

one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic. Effective on the same date the railroads generally throughout southern territory, published a uniform basis of interstate round-trip fares to displace the round-trip fares theretofore in effect, namely, in coaches on the basis of 180 per cent of the one-way fare of 2.2 cents, or 1.98 cents a mile, with a return limit of 3 months; and in sleeping and parlor cars on the basis of 166 2/3 per cent of the one-way fare of 3.3 cents in such cars, or 2.75 cents a mile, with a return limit of 3 months. The increased fares proposed for application in southern territory were protested and suspension of their operations was requested by the Price Administrator, but we declined to suspend. The fares so increased are now in effect on interstate traffic.

"Thereafter, with the approval of the rate regulatory authorities of those States, the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars were increased to the respective levels of the corresponding interstate fares in Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina, and the round-trip fares in sleeping and parlor cars were increased to the level of the interstate fares in such cars in North Carolina and Kentucky. The rate regulatory authorities of Alabama, North Carolina, Tennessee, and Kentucky have declined to authorize the increases sought by the railroads in one-way and round-trip coach fares in those states, and the rate regulatory authorities of Alabama and Tennessee have also refused to authorize the increases in the round-trip fares in sleeping and parlor cars. It is those fares in the four States last named which are hereunder investigation."

With respect to the reasonableness of the basic interstate coach fare of 2.2 cents, the Commission pointed out that from 1936 to the date of its order the five principal carriers operating in the State of North Carolina had shown a deficit from passenger operations for every year except the

war year 1942. Referring to an application by the North Carolina Utilities Commission for a further investigation as to the reasonableness of interstate fares, after the entry of its order raising the interstate fares in southern territory to the level prevailing elsewhere, the Commission said:

> "The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than the maximum basic fares found reasonable in Passenger Fares and Surcharges, supra, plus the 10 per cent increase authorized in Ex Parte No. 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents."

With respect to discrimination against interstate passengers, the Commission said: "All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same." And in replying to a contention that the intrastate coach service in North Carolina has deteriorated and is inferior to that provided for interstate traffic, the Commission said: "Admittedly, interstate as well as intrastate passengers may and do travel on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accommodations and service furnished intrastate passengers."

With respect to the discrimination caused by these lower intrastate fares against the interstate commerce of the

carriers, in that under the intrastate rates the intrastate passenger service was not contributing its fair share of the revenues required to maintain an adequate and efficient transportation service, the Commission said:

> "On the basis of audits made for representative periods by the principal respondents in each of these proceedings, the estimated amount of additional revenue which the respondents in the respective States would have received during those periods if the assailed intrastate fares had been on the interstate level, projected over the period of a year, exceeds $750,000 per annum in Alabama, $526,000 in Kentucky, $558,000 in North Carolina, and $556,000 in Tennessee."

Although many matters have been referred to in the pleadings and arguments, the case before us resolves itself into four questions: (1) Did the Commission have power to require that intrastate fares be raised to the level of reasonable interstate fares so as to eliminate discrimination against passengers in intrastate commerce and discrimination against the interstate business of the carriers? (2) Did the Commission's finding that the interstate fares were reasonable have adequate support in the record? (3) Did the Commission's findings as to discrimination against interstate passengers and the interstate commerce of the carriers have adequate support in the record? and (4) Was adequate consideration given by the Commission to the requirements of the National Stabilization Act? We think that all of those questions must be answered in the affirmative and shall discuss them in the order named.

The Power of the Commission.

Paragraph (3) of section 13 of the Interstate Commerce Act as amended, 49 U. S. C. A. 13(3), clothes the Commission with power, in any proceeding instituted under the Transportation Act, to investigate any rate, fare, etc. made or imposed by the authority of any state. Paragraph (4) of that section authorized the Commission to prescribe rates, fares etc. to remove undue, unreasonable or unjust discriminations found to exist against persons and localities or

against interstate or foreign commerce as a result of intrastate rates or fares. That paragraph is as follows:

> "Sec. 13, Par. (4) Duty of Commission where State regulations result in discrimination. Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner, as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Under this provision, it is the duty of the Commission not merely to remove discriminations against persons and localities but to remove unjust discrimination against interstate commerce resulting from unreasonable intrastate rates. Under 15a (2) of the Interstate Commerce Act, 49 U. S. C. A. 15A (2), it is the duty of the Commission, in prescribing rates, to give due consideration to the effect thereof on the movement of traffic and on the principal objective of the act, which is to provide for the country an adequate and efficient railway transportation service. The power granted by 13(4) is to be construed along with the duty imposed by 15a(2). As said by Chief Justice Taft in Wisconsin R. R. Com'n *v.* Chicago, Burlington & Quincy Railroad Co., 257 U. S. 563, 585-586:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate

national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railway are to earn a fixed net percentage of income, the lower the intrastate rates the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates,' i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, sec. 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of sec. 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

To the same effect is what is said by Chief Justice Hughes and Chief Justice Stone in the more recent cases of United States *v.* Louisiana, 290 U. S. 70; Florida *v.* United States, 292 U. S. 1; and Illinois Commerce Com'n *v.* United States, 292 U. S. 474. In the case last cited Chief Justice Stone said:

"The scope and application of sec. 13(4) have so recently been fully considered in opinions of this Court

in United States *v.* Louisiana, 290 U. S. 70; Florida *v.* United States, ante, p. 1; See also Georgia Public Service Commn. *v.* United States, 283 U. S. 765; Florida *v.* United States, 282 U. S. 194; that it is unnecessary to repeat that discussion here. Under Sec. 13(4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates against interstate commerce, by raising intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service."

The philosophy underlying the granting of such power to the Commission was well put by Chief Justice Taft in the Wisconsin case, supra, as follows:

"• • • such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unity and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso [of the Interstate Commerce Act].

• • • • • • •

"Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the

work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. Wilson *v.* Shaw, 204 U. S. 24; Luxton *v.* North River Bridge Co., 153 U. S. 525; California v. Central Pacific R. R. Co., 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

In the light of these authorities, there is no force in the argument that the power exercised by the Commission was a violation of the rights of the states reserved by the 10th Amendment or in the suggestion that the duty rests upon this court to hear the case de novo for the purpose of ascertaining whether states rights have been violated. As was well said by Chief Justice Hughes in Florida *v.* United States, supra, 292 U. S. 1, 12:

"The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by sec. 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate

body. Shreveport Case, 234 U. S. 342, 351, 354, 355; Railroad Commission of Wisconsin *v.* Chicago, B. & Q. R. Co., supra. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. United States *v.* Louisville & Nashville R. Co., 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission."

The Reasonableness of the Interstate Fares.

The Commission was fully aware that it had no power to order intrastate fares raised to the level of interstate fares without first finding that the interstate fares were reasonable. It so stated in its report, citing the decisions of the Supreme Court to that effect in Georgia Public Service Commission *v.* United States, 283 U. S. 765, and United States *v.* Louisiana, 290 U. S. 70. As a basis of its order, therefore, it made not only the general finding quoted above, but also the specific findings as to revenues from passenger business since 1936, which we have mentioned, referred to the increased costs of doing business and gave the history of passenger fares in the United States which we have quoted. In the light of all of these, we think there can be no question but that the finding of the reasonableness of interstate fares is adequately supported. It is perfectly clear that the reasonableness of such fares is not to be determined solely on the basis of transient war conditions, or upon the unusual passenger revenues due to such conditions, or upon a consideration of the passenger business disassociated from the other business of the carriers.

On the contrary, the Commission, in discharging its duty to fix just and reasonable rates and fares which will secure for the country an adequate and efficient transportation system, must view the system as a whole and must judge the future in the light of the past as well as of the present. The rate structure has had an historical development, which may not be ignored in dealing with the question of the reasonableness of particular rates or fares.

Until the year 1942 the passenger business of the railroads had for a number of years been a continuing source of loss to them notwithstanding the high fares that prevailed prior to the order of 1936. That order was made reducing coach fares generally to 2 cents per mile, not because there were excessive revenues from passenger business warranting the reduction, but because it was thought that, in view of prevailing conditions, that fare would produce greater revenue than the higher fares and would more nearly approximate a just fare in view of what the service rendered was reasonably worth. At the same time, southern carriers were allowed to put into effect the experimental 1.5 cents coach fare, in an effort to recover some of the passenger business that they had lost and to increase the revenues of a branch of the business that showed a constant and increasing deficit. At that time the question of the reasonableness of passenger fares was thoroughly examined from every angle. See Passenger Fares and Surcharges 214 I. C. C. 174.

The reasonableness of passenger fares was again submitted to a searching inquiry by the Commission in its report of March 2, 1942, in Ex Parte No. 148, wherein, following certain wage increases and a showing of other increased costs, it approved an increase of 10 percent in passenger fares and a smaller proportionate increase of freight rates. In granting the increase, the Commission said (248 I. C. C. 545, 565): "Because of the abnormal conditions which now prevail throughout the country, we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute toward meeting the added operating costs of the railroads." The reasonableness of

the general level of passenger fares was again considered in connection with Ex Parte 148, in the Commission's report of April 6, 1943, in which, while suspending the freight rate increases, it declined to suspend the increase in passenger fares. 255 I. C. C. 357. The Commission said (pp. 394-395): "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight. • • • We find no modification of our previous findings, orders, and authorizations respecting the present interstate standard passenger fares is necessary." The matter was again dealt with by the Commission in its supplemental report of November 8, 1943, 256 I. C. C. 502.

The order of the Commission permitting the Southern carriers to abandon the experimental coach fare of 1.5 cents per mile, and to raise their interstate coach fare to the standard coach fare of 2.2 cents per mile, was entered on August 1, 1942; and the order in Ex Parte No. 148 was modified accordingly. The increase was made, therefore, in the course of proceedings in which the general level of passenger fares was thoroughly investigated and the facts justifying the fares established were fully found. These findings were before the Commission in the proceedings to raise intrastate fares and were properly considered along with the other evidence adduced. Without regard to the other evidence, they fully justified the findings of the Commission as to the reasonableness of the interstate fares. An examination of the record shows, however, that ample evidence was introduced to support the findings that the interstate fares were reasonable. The Commission gave due consideration to the evidence as to increase in passenger traffic

and revenues since the beginning of the war is shown by the following passage from its report, p. 142:

> "The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads of the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte No. 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943; such as inductions into the armed forces of great number of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movement of Army Troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary."

The argument is made that, having approved a fare of 1.5 cents in a period of depression when the railroads were losing money on their passenger business, the Commission cannot, except by arbitrary action, now approve a fare of 2.2 cents, in a time of prosperity when the passenger business has increased until it is a source of unexpected profit. The answer, of course, is that the low fare was allowed as an experiment in an effort to recapture lost passenger business. With the increase of passenger business, the necessity for the low fare to attract business has passed, and the fare can now be fixed without reference to that consideration. It is elementary that, a reasonable basis being shown, the fixing of a rate or fare is a matter for the Commission and not for the courts, and that the courts, on review of an order of the Commission, may not substitute their judgment for that of the Commission as to its reasonableness. Florida v. United States, supra, 292 U. S. 1, 12; Union Pac. R. Co. v. United States, 222 U. S. 541, 547.

It is argued, also, that it was incumbent upon the Commission, in condemning intrastate fares as discriminatory, to determine the reasonableness of interstate fares in the light of existing conditions and not of conditions that existed in former years; but it is clear that the Commission has had existing conditions in mind in finding the interstate fares to be reasonable. It is well settled that ordinarily the experience of a single year is an unsafe guide in fixing rates. United Gas Public Service Co. v. Texas, 303 U. S. 123, 145; West Ohio Gas Co. v. Public Utilities Com., 294 U. S. 79, 81. Particularly is this true when the single year is a war year and the conditions are abnormal. What weight shall be accorded a temporary increase of business due to war conditions is manifestly a matter for the Commission and not for the courts.

There is no force whatever in the argument that the finding as to reasonableness of interstate fares was made without notice and hearing. As indicated above the findings upon which interstate passenger fares were fixed and upon which the 10 percent increase was allowed (the abandonment of the experimental coach fare being permitted in connection with the latter) were made after the fullest hearing and investigation, with two hearings on petitions of the Price Administrator as to whether the increases in rates and fares should not be suspended in the interest of price stabilization. In addition to these, consideration was given by the Commission to the evidence adduced on the hearing on intrastate fares. It is true that the North Carolina Commission in July 1943 filed with the Interstate Commission a petition asking the latter for a general investigation on its own motion of the reasonableness of interstate coach fares to, from and through North Carolina, and that the Interstate Commission refused to take action on the petition; but the Commission referred to the petition in the report accompanying the order here complained of and stated that the record did not warrant any modification of its conclusions in Ex Parte No. 148. Whether the Commission, having so recently and so fully considered the reasonableness of interstate fares would again go into the question was a matter well within its discretion. I. C. C. v. Jersey City, — U. S. — 64 S. Ct. 1129, 1135; Illinois Com. Com. v. United

States, 292 U. S. 474, 480. As was said by the Supreme Court in the Jersey City case:

"Only once in the history of administrative law has this court reversed a Commission for refusing to grant a rehearing on the contention that the record was 'stale.' * * * The Court, however, promptly restricted that decision to its special facts, United States v. Northern Pacific R., 288 U. S. 490, 53 S. Ct. 406, 77 L. Ed. 914, and it stands virtually alone. In Baltimore & Ohio R. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 817, 80 L. Ed. 1209, Mr. Justice Brandeis, concurring, said, 'The Atchison case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing.' * * *

"This Court has held that the Interstate Commerce Commission did not abuse its discretion in refusing a request for a new study as a basis for rate-making, although changes were alleged consisting of a falling off in volume of traffic, improvement of highways in the District resulting in diversion of traffic from rail to truck, decline in value of the articles transported, reduction in wages and cost of supplies, and curtailment of the amount of service rendered, and where the Commission decided that it was able on the record before it to consider the affect of the factors suggested by the appellants and that a new cost study was unnecessary. Illinois Commerce Commission v. United States, 292 U. S. 474, 480, 54 S. Ct. 783, 785, 78 L. Ed. 1371. Except that the trends are in an opposite direction, the inquiry demanded here is of the same nature. See also Georgia Public Service Commission v. United States, 283 U. S. 765, 769, 770, 51 S. Ct. 619, 620, 621, 75 L. Ed. 1397.

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"The rule that petitions for rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. United States ex rel.

Maine Potato Growers & Shippers Ass'n. v. Interstate Commerce Commission, 66 App. D. C. 398, 88 F. 2d 780, 784, certiorari denied 300 U. S. 684, 57 S. Ct. 754, 81 L. Ed. 886; Mississippi Valley Barge Line Co. v. United States, D. C., 4 F. Supp. 745, 748; Union Stock Yards v. United States, D. C., 9 F. Supp. 864, 873; American Commission Co. v. United States, D. C., 11 F. Supp. 965, 972; R. C. A. Communications, Inc., v. United States, D. C., 43 F. Supp. 851, 858."

The North Carolina Commission could not demand that the Interstate Commission make a new and independent investigation as a prerequisite to its order raising intrastate fares. That order was but a step in the process of adjusting the rate structure of the nation and was properly predicated upon the findings, as to intrastate fares already made. The matter was well put by the Supreme Court in the *Jersey City* case, supra, as follows:

"Nor can a litigant insist that a commission may not take a second step in a rate-making process without retracing all previous ones. As put by the Chief Justice: 'The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details.' Such procedure may be adopted where it is appropriate to carry out the provisions of an act. Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 584, 62 S. Ct. 736, 742, 86 L. Ed. 1037."

Answering a somewhat similar contention in Illinois Com. Com. v. United States, supra, and denying that the Commission was required to make a further cost study based on alleged changed conditions, the Supreme Court said:

"Whether or not the cost study was representative, whether the study should have been more refined, and

whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts."

Plaintiffs contend that the reasonableness of intrastate fares was excluded from consideration at the hearing by a statement of the Examiner. There is no merit in the contention. At the beginning of the hearing, counsel for North Carolina stated that it was his understanding that the reasonableness of interstate fares was not in issue and the Examiner responded: "Well, it is before the Commission to the extent that it is a burden resting upon respondents to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise, it is not in issue. It is not subject to attack, and the parties are at liberty to show what facts they have and they [their] position on that particular question." No objection was voiced to the Examiner's statement and the question as to the reasonableness of the interstate fares was fully considered by the Commission. As indicated above, we think that the Commission would have been acting reasonably and within its powers, if it had treated the reasonableness of the interstate fares as settled by the recent proceedings, and had considered in the proceeding before it merely the question as to whether the North Carolina fares were discriminatory. When the Commission had so recently made an adjustment of interstate fares after a nation-wide inquiry, it was not required to go over this work again in a proceeding to bring intrastate rates into harmony with them.

Intrastate Fares Discriminatory

The reasonableness of the interstate fares being established, there can be little question as to the discriminatory character of the intrastate fares. It is established that the

same service is afforded intrastate passengers as is afforded in interstate service; and, where this is true, discrimination is ordinarily established with sufficient certainty by showing a difference in rates. As said in *Illinois Com'n.* v. *United States*, 292 U. S. 474, 485, "The affect of maintaining a lower rate, intrastate, then the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions." Defendants endeavor to justify the difference in fares by contrasting the service rendered by the streamlined de luxe interstate trains with the poor service afforded by the branch lines; but intrastate passengers travel on the streamlined interstate trains and interstate passengers travel on the branch lines. The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations. It is nothing short of nonsense to say that under such circumstances an intrastate fare of 1.65 as against an interstate fare of 2.2 does not constitute an undue discrimination in favor of intrastate passengers and against interstate passengers. When such discrimination is shown on a state-wide scale a general finding of discrimination is sufficient, and there is no need of a finding of discrimination against particular persons or with respect to particular fares. See *United States* v. *Louisiana*, 290 U. S. 70, 79 (distinguishing *Florida* v. *United States*, 282 U. S. 194, upon which plaintiffs particularly rely) where the Court said:

> "The case of the Louisiana rates was not alone before the Commission, and it should not be treated as though it were. A number of other states, contesting in the aggregate a wide range of rates, were heard at the same time. Had the Commission been required to go into the circumstances of each item with particularity the purpose of its original order would have been defeated. It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from

the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate.

"A question different from that before us was presented in *Florida* v. *United States, supra.*. There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in Northern Florida. It involved only one railroad and one commodity."

And it is equally clear that discrimination has been shown within the meaning of the statutory provision against the interstate commerce of the carriers in that, because of the intrastate fare, intrastate passengers are not making their proportionate contribution to the maintenance of the transportation system. The intrastate fare produces in North Carolina $525,000 less than would be produced by the interstate fare on the same volume of traffic, which means that intrastate passengers have paid just that much less than the Commission estimates to be their proper contribution for the service rendered. A failure of intrastate traffic to bear its just burden of expense means necessarily that a greater burden must be borne by interstate traffic if the transportation system is to be maintained at the level of efficiency which section 15a(2) contemplates; and this is unquestionably an undue discrimination against interstate commerce within the meaning of section 13(4).

It is not necessary for the Commission to find, as a prerequisite to an order raising intrastate fares, that such fares are noncompensatory or will result in a deficit in operating revenues of that particular branch of the business. On the contrary, it is for the Commission to say what portion of the revenue necessary to an adequate and efficient transportation system the various kinds of businesses engaged in by the carriers shall contribute; and an undue burden upon and discrimination against interstate commerce is shown where intrastate rates for a particular service are so low that the service will not contribute its proportionate part of the revenue necessary to the plan which the Com-

mission has devised for the development of the interstate system. It would greatly burden if not entirely wreck the transportation system of the country for local commissions to have the power to base intrastate rates or fares on their ideas as to how the expense of maintaining an adequate transportation system should be apportioned among the various classes of business carried on by the carriers. We must bear in mind, in this connection, what was so wisely said by Chief Justice Taft in the *Wisconsin* case, *supra*, that "commerce is a unit and does not regard state lines"; that the affirmative power of Congress in developing interstate commerce is clear; and that, "in such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable."

It must not be overlooked that the carriers here who are carrying intrastate passengers are interstate carriers, and that it is only because of their interstate business that they are able to furnish the present level of intrastate service. The Commission has fixed the rates and fares on their various classes of business with a view of maintaining their efficiency as interstate carriers for the service of the public; and the rate structure so carefully constructed should not be burdened by lower intrastate rates because local regulatory bodies may entertain different theories of rate making. These observations apply with peculiar force in the case at bar, where it appears that the interstate fares fixed by the Commission have been accepted as reasonable intrastate fares by 44 of the 48 states of the Union. In the language of the *Louisiana* case, *supra*, there is nothing in the conditions prevailing in the other four states "so different from the rest of the country as to lead to the conclusion that the intrastate rates raised to the reasonable general interstate level would not themselves be reasonable."

Consideration Given Stabilization Act

The contention that adequate consideration was not given by the Commission to the representations of the Price Administrator under the Stabilization Act, requires but brief consideration. The record shows that full consideration was given the representations of the Price Adminis-

trator, both in the hearings in Ex Parte No. 148 and in the hearing which resulted in the order here involved. As a matter of fact, the reopening of proceeding Ex Parte No. 148 resulted in the suspension of the authorized increase in freight rates; and the Commission, in the passage of its order of April 6, 1943, above quoted, 255 I. C. C. 357, 394-395, pointed out why passenger fares were treated differently. In the report accompanying the order here complained of the Commission showed that it had given full consideration to the contentions of the Price Administrator, saying:

> "The Price Administrator contends that the proposed increase in fares is inconsistent with the wartime stabilization program; further, that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if we should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares, in Increases in Texas Rates, Fares, and Charges, 253 I.C.C. 723, and in the report on further hearing in Increased Railway Rates, Fares, and Charges, supra, we discussed contentions that rate increases therein proposed would be inconsistent with the efforts of the Government to avoid inflation and would conflict with the provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Act and exclusive regulations thereunder. We concluded that the provisions of these acts, except those pertaining to the giving of notice and consent to intervene to the designated federal agent, made no changes in or additions to the Interstate Commerce Act with respect to the rates, fares, and charges of common carriers by railroad. The provisions of these acts respecting the giving of notice and consent to intervene to the designated federal agent have been complied with in each of these proceedings. The evidence bearing upon the further contention of the Price Administrator has been recited hereinbefore."

An examination of the report in Increases in Texas Rates, Fares and Charges, 253 I. C. C. 723, 734-736, referred to in

the above quotation, shows that the Commission was fully aware of its duty under the Stabilization Act and was discharging it in accordance with the spirit as well as the letter of that act. What weight was to be accorded the contentions advanced by the Price Administrator pursuant to the act, was a matter committed to the discretion of the Commission; and the right to review the exercise of that discretion is given neither to the Price Administrator nor to this Court. Whatever question might have existed with regard to this was set at rest by the recent decision of the Supreme Court in the Jersey City case, supra, where Mr. Justice Jackson, speaking for the Court, said:

> "The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. It is without power to protect these essential transportation agencies from raising labor and material costs. It can decide only how such unavoicable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganizations, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent. * * * The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. *We think the weight to be given to the Price Administrator's contentions was for the Commission, not the court, to determine.* The scope of proper judicial review does not expand or contract, depending on what party invokes it. It is as narrow now as it was when appealed to by the company. Cf. Hudson & Manhattan R. Co. v. United States, 313 U. S. 98, 61 S. Ct. 884, 85 L. Ed. 1212. If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general

principles which protect the finality and integrity of decisions by administrative tribunals." (Italics supplied).

We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its competency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record, for the reasons above stated, however, our decision would not be different if this evidence were admitted and considered.

Our conclusion is that the order complained of is a valid exercise of power by the Commission; that it is supported by sufficient findings of fact, which in turn are supported by substantial evidence; that it is not arbitrary or unreasonable; and that it is not rendered invalid by anything contained in the Stabilization Act. The injunction prayed for will accordingly be denied and the suit will be dismissed. Because of an intimation in the argument that, in the event of an adverse decision, plaintiffs would ask a stay pending appeal, we have given consideration to that matter and are of opinion that such stay should not be granted. Not only is the order of the Commission clearly valid in our opinion, but no circumstances have been shown which would justify this Court in ordering that it be stayed. Being entered by the Commission, it is presumptively in the public interest; its effect is merely to require intrastate passengers in North Carolina to pay the fares that interstate passengers are paying throughout the country and that intrastate passengers are paying in all except four of the States; and it is not possible to provide against damage which might result from a stay by requiring a bond. Under such circumstances, we think it clear that we should not grant the stay. Virginian Ry. v. United States 272 U. S. 658, 673. As said in the case cited:

"An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay

is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure.

"In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

Injunction Denied and Suit Dismissed.

(S.) JOHN J. PARKER,
United States Circuit Judge,
Fourth Circuit.

(S.) I. M. MEEKINS,
United States District Judge,
Eastern District of North Carolina.

(S.) JOHNSON J. HAYES,
United States District Judge,
Middle District of North Carolina.